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In the Supreme Court of the United States

OCTOBER TERM, 1977

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, PETITIONER

v.

EDWARD SADLOWSKI AND
RAY MARSHALL, SECRETARY OF LABOR

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM ON BEHALF OF THE SECRETARY OF LABOR

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INTRODUCTION

This memorandum is submitted on behalf of the Secretary of Labor in response to this Court's Order of January 23, 1978.

Although he is a party to the litigation, the Secretary has not heretofore participated in this proceeding for the recovery of attorneys' fees by the Intervenor-Plaintiff, Edward Sadlowski. In a "Statement of Position" filed at the request of the Magistrate in this case, the Secretary indicated his view that the Labor-Management Reporting and Disclosure Act of

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1959 (LMRDA) does not appear to authorize an award of attorneys' fees to an intervenor in Title IV litigation in which the Secretary has been successful. However, he declined to participate in a proceeding in which he felt he had "no involvement or direct interest."[1] For the same reason, the Secretary declined to express a view on the propriety of an attorney's fee award in *Usery* v. *Local 639, International Brotherhood of Teamsters,* 543 F. 2d 369 (C.A. D.C.), certiorari denied *sub nom. Local Union No. 639* v. *Marshall,* 429 U.S. 1123, in which the Court of Appeals for the District of Columbia Circuit also upheld an award of attorneys' fees to the intervenor. In both cases, the respective courts of appeals attached significance to the Secretary's silence (see 543 F. 2d at 385; Petition, p. 20a).

On reconsideration, however, we have reached the conclusion—as the Solicitor of Labor has candidly expressed it (Letter of January 5, 1978, in petitioner's Supplemental Brief Reporting Important Development, p. 1a)—that "the Department was mistaken in its decision to take no official position in these cases with respect to the allowance of attorneys' fees to intervenors.' We now believe a rule permitting the recovery of such attorneys' fees significantly impedes the effective enforcement of Title IV. And, although we are sensitive to the charge that our earlier indications of disinterest may have misled the court of appeals, we are nevertheless persuaded that the question is of sufficient importance to merit review by this Court in the present case, and accordingly urge the Court to grant the pending petition for certiorari.

[1] For the convenience of the Court, a copy of the Statement is attached to this brief as Appendix A.

BEST COPY AVAILABLE

DISCUSSION

1. We are not concerned, at this stage of the case in this Court, with the issue of the exact formula that might be appropriate for determining the amount of attorneys' fees recoverable by an intervenor if any such award is permissible. Rather, we address the broad question whether, in any suit under Title IV of the LMRDA, the court does or does not have authority to assess the union for attorneys' fees claimed by the intervenor. Our submission is that, in no case, is the court authorized to make such an award. We add, however, that, in practice, if such awards are permissible, it is predictable that attorneys' fees, in substantial sums,[2] will almost invariably be assessed against the union when the proceeding is successfully concluded. For, whatever the precise test, it will be a rare instance when a successful intervenor's claim to have contributed to the litigation will be entirely defeated.

If we are right in this assessment of the realities, the question presented assumes greater importance and the present case is as appropriate a vehicle for deciding it as any that will arise in the future. The

[2] In the present case, the fee bill submitted by three senior attorneys and one associate, on the basis of hours logged at stated rates and without applying any "multiplier," would exceed $114,000.

rule announced here, if correct, will govern every subsequent instance of successful intervention in a Title IV suit.

2. It may be objected that, even so, the issue is of little significance because, since the green light was given in *Trbovich* v. *Mine Workers,* 404 U.S. 528, six years ago now, such interventions have been very infrequent. But that may not remain the situation. Indeed, part of our concern is that the expectation of recovering attorneys' fees will substantially increase the number of such interventions.

So saying, we do not mean to question *Trbovich.* Nor would we urge effectively "repealing" that decision by denying an award of counsel fees to intervenors. Cf. *Hall* v. *Cole,* 412 U.S. 1, 13. But, in the context of Title IV of the LMRDA, where—unlike Title I—the complainant does not initiate the court action and is merely "seconding" the Secretary, the occasion for separate legal representation is very much diminished. Moreover, the successful intervenor in a Title IV suit—unlike the plaintiff under Title I—has at least a serious prospect of achieving union office and with it a position in which he will be better able to compensate his attorney.

On the other hand, there is ground for apprehending that the potential recovery of attorneys' fees directly from the union will unduly encourage intervention. Indeed, the holding here and in the *Local 639* case, *supra,* will prompt intervention at a stage when no further contribution to the lawsuit is useful. The

reason is that attorneys' fees incurred before intervention are allowed but can only be recovered by formally intervening.

3. Nor is an artificial stimulus to intervention our sole concern. Perhaps more important is the adverse effect on settlements that, in our view, is likely to result if attorneys' fees must be awarded to the intervenor. It is self-evident that unions will be less inclined to agree to end the litigation by voluntary compliance if they are exposed to a substantial monetary award in the form of counsel fees for the intervenor. In suits under Title IV—unlike other parts of the LMRDA—damages are not recoverable, thus encouraging settlement. But the balance is disturbed when the union must, besides agreeing to a supervised election, also accept liability for payment of the intervenor's attorneys' fees.

Moreover, settlements are often effected—as in the present case—on terms that include a disclaimer of any wrongdoing by the union itself. Yet such a disclaimer may not survive the complainant's attempt to justify his claim for attorneys' fees. The knowledge that accusations of misdeeds will follow may well discourage settlements.

Any substantial disincentive to settlement of Title IV litigation is serious. Settlements have particular value in this area because of the practical importance of a speedy disposition. Obviously, if a new election is to be held, that should happen as soon as possible. At present, well over half of the Title IV suits initi-

ated by the Secretary are successfully concluded by settlement.[3] The effective implementation of the law would be severely affected if that were no longer to be the case.

4. What is more, whether or not the suit is resolved by settlement, a rule allowing the award of attorneys' fees will often burden the litigation with further proceedings. Presumably, the intervenor must show that his formal participation in the lawsuit was necessary in advancing something more than his own private interest, and, if so, to what extent his attorneys' fees are attributable to a contribution for the "common benefit" of all union members. This may involve an effective new trial of the merits. And it may place the parties in unnatural postures: the intervenor justifying his participation by attacking the Secretary's shortcomings as a litigant, and the union defending the Secretary to show that attorneys' fees were needlessly incurred. At all events, delays and further costs will often result.

5. For the reasons just outlined, we believe that the allowance of attorneys' fees to successful intervenors will seriously burden Title IV litigation and will prejudice the administration of the Act. Of course, those

[3] We are informed by the Department of Labor that, of the 103 Title IV cases initiated since January 1973 and finally disposed of at the district court level, some 64 were concluded by settlement. Almost invariably, those settlements involve supervision by the Secretary of the forthcoming election, normally a new special election, otherwise, if time does not permit, the next regularly scheduled union election.

consequences, however inconvenient, must be borne if the law requires it. But we submit it does not.

Indeed, the rationale of the *Trbovich* decision was, in important part at least, that the intervenor has a *private* interest in the outcome of the suit which, although related, is not identical, with the Secretary's broader concern—assuring union democracy. 404 U.S. at 538–539. Here, unlike the situation in *Hall* v. *Cole, supra,* the Secretary alone is charged by Congress with vindicating the public interest. It would seem to follow that the intervenor's participation is not for the "common benefit" of all union members, but, rather, to safeguard his personal stake in the result. If that is so, then, attorneys' fees ought not be awarded under the prevailing guidelines. See *Alyeska Pipeline Co.* v. *Wilderness Society,* 421 U.S. 240.

In our submission, this is not an appropriate instance for departing from the "American rule." The right of intervention recognized by *Trbovich* was not intended to lead to "burdensome multiple litigation" (404 U.S. at 536) or to imperil the salutary experience of early settlements in Title IV cases. Nor does the limited relief provided in suits under this Title (see 29 U.S.C. 482(c)) suggest a congressional intention to expose unions to substantial monetary penalties in the form of claims for attorneys' fees. We believe the decision below is unsupported in law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the writ of certiorari should be granted and the judgment of the court of appeals reversed.

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Solicitor General.
LOUIS F. CLAIBORNE,
Assistant to the Solicitor General.

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Solicitor of Labor,
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Department of Labor.

MARCH 1978.

APPENDIX A

United States District Court for the Western District of Pennsylvania

[Civil Action, File No. 73–0957 B]

JOHN T. DUNLOP, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR, PLAINTIFF
v.
UNITED STEELWORKERS OF AMERICA, AFL–CIO–CLC (DISTRICT 31), DEFENDANT, EDWARD SADLOWSKI, INTERVENOR

PLAINTIFF'S STATEMENT OF POSITION RE INTERVENOR'S VERIFIED APPLICATION FOR ATTORNEY'S FEES DIRECTED AGAINST DEFENDANT

The Intervenor presently seeks an award of attorneys' fees from the defendant herein. The Secretary, having previously submitted his statement of facts to the Court, and while having no involvement or direct interest in this proceeding, submits this statement solely for the purpose of apprising the Court of his views, as requested, of certain pertinent provisions, regulations and cases under Title IV of the Labor-Management Reporting & Disclosure Act of 1959 (29 U.S.C. § 401, *et seq.*) which bear upon this issue.

A reading of the provisions of Title IV of the Act (29 U.S.C. § 482 and § 483) reveals that unlike other Titles of this statute, for example Title V, section 501(b) (suit by a member against an officer of a labor organization for breach of fiduciary responsibility),

Congress provided for no award of attorneys' fees in Title IV, nor do the regulations issued by the Secretary pursuant to the statute authorize or even discuss such an award of attorneys' fees. This, obviously, because the Congress did not provide for a role under this provision of the statute to private litigants. Rather, as the Supreme Court so aptly pointed out in *Calhoun* v. *Harvey,* 379 U.S. 134 (1964), "it is apparent that Congress decided to utilize the special knowledge and discretion of the Secretary of Labor in order to best serve the public interest".

Despite the decision of Congress to preclude private litigants from initiating a lawsuit challenging an election of union officers under Title IV, the Supreme Court, resting on its equity powers and the Federal Rules of Civil Procedure rather than upon any specific language contained in Title IV, held in *Trbovich* v. *United Mine Workers of America,* 404 U.S. 528 (1972) that limited private intervention in lawsuits brought by the Secretary of Labor would be permitted.

The Supreme Court was careful in its holding in *Trbovich supra,* to sharply delineate the roles of private litigants as opposed to that of the Secretary, the former being permitted only to protect his private interest which the Court pointed out might sometimes be at variance with the position of the Secretary in vindicating the public right.

Since intervention in this case was permitted on the basis of *Trbovich,* we must subsume that the Intervenor sought to protect his private interest.

As to whether an award of attorneys' fees should be allowed by this Court because of any private interest protected by counsel in the course of this litigation

would, in our view, be a matter for the Court's discretion to be exercised, if at all, on the basis of the court-created limited right to intervene in Title IV matters under the holding in *Trbovich.*

Respectfully submitted,

/s/ William J. Kilberg,
WILLIAM J. KILBERG,
Solicitor of Labor,

/s/ Louis Weiner,
LOUIS WEINER,
Regional Solicitor,

/s/ Stephen K. Ernst,
STEPHEN K. ERNST,
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/s/ Richard L. Thornburgh,
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